(2)

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

94-6615

CARL THOMPSON,

Petitioner,

Vs.

PATRICK KEOHANE, Warden,
BRUCE M. BOTELHO, Attorney General,
State of Alaska,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CARL THOMPSON
Petitioner
In Pro Per
Reg. No. 90712-011 (C-Unit)
3901 Klein Blvd.
Lompoc, Ca. 93436

QUESTION PRESENTED

What standard of review shall an appellant court employ when there's conflicting case law on the standard of review of when a suspect has been taken "into custody", triggering the requirement that Miranda warnings be administered?

The Second, Third, Sixth, and Eleventh Circuits consider the question to be essentially legal, or a mixed determination of law and fact, meriting de novo review. The Seventh, Eighth, and Ninth Circuits favor treatment as a factual matter, to be left undisturbed on appeal unless clearly erroneous.

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DECISION BELOW

Mr. Thompson brings this Petition from a final decision from the Ninth Circuit Court of Appeals, filed on August 11, 1994.

JURISDICTION IN THE SUPREME COURT

Carl Thompson was convicted by a jury verdict of the offenses of murder in the first-degree and tampering with physical evidence in the Superior Court for the State of Alaska at Fairbanks. Judgement was entered on July 22, 1987. Petitioner appealed the ruling on a suppression motion to the Alaska Court of Appeals; his conviction was affirmed. He then sought discretionary review in the Alaska Supreme Court; this petition was denied without opinion.

Petitioner then brought a petition under 28 U.S.C. §2254 in the United States District for the District of Alaska, in which he sought federal relief for a violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution. The petition was denied December 9, 1993, and a Certificate of Probable Cause was executed by the clerk, at the court's direction, on December 27, 1993.

The Court of Appeals for the Ninth Circuit issued it's opinion August 11, 1994. This Petition follows. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS

Amendment V to the United States Constitution: No person shall be... compelled in a criminal case to be a witness against himself...

Amendment XIV to the United States Constitution: No State shall... deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

On September 10, 1986, two moose hunters found the body of a dead woman floating in a gravel-pit off Elliott Highway, twenty miles north of Fairbanks, Alaska.

On September 11, 1986, the Alaska State Troopers issued a press-release asking for the public's help in identifying the woman's body.

On September 12, 1986, the woman's body was identified through dental records as that of Dixie Gutman.

On September 13, 1986, David Huffaker and Mike Stanton made a joint tape-recorded statement at Trooper Headquarters implicating Mr. Thompson in the death of his ex-wife, Ms. Gutman.

Also on September 13, 1986, a woman named Valerie Key, notified troopers that she found some of the victim's personal belongings in a dumpster.

At this point, the Troopers had zeroed in on Mr. Thompson as their prime suspect in the murder of Ms. Gutman.

On September 15, 1986, Sergeant Stockard of the Alaska State Troopers telephoned Mr. Thompson and asked him to come down to the station and identify some personal effects of his ex-wife that had been found.

When Mr. Thompson arrived at trooper headquarters, he was taken to the interrogation room where Troopers' Hard and Stockard were waiting to interrogate him.

Early in the interrogation on 9/15/86, the troopers made it clear to Mr. Thompson that he was their prime suspect in the murder of his ex-wife.

The troopers next informed Mr. Thompson that other troopers were at his residence with a search warrant at that very moment, and they also had a search warrant for Mr. Thompson's truck, which he had driven to the station-house.

The troopers next confronted Mr. Thompson with the know facts and presented him with some of the evidence they had to prove he had not been truthful with them.

The troopers compared Thompson's situation to that of a poker player facing unbeatable odds. To further induce Mr. Thompson into incriminating himself; the troopers made promises of leniency if he cooperated and made a statement confessing to the murder of his ex-wife.

This interrogation lasted from 10:58 a.m. until 12:45 p.m., where for the first hour and a half, Mr. Thompson steadfastly denied any involvement in the death of his ex-wife, but in the end, under unrelenting pressure by the troopers, Mr. Thompson made a confession, without waiving or receiving a Miranda

warning.

After Mr. Thompson gave the troopers his statement, his truck was impounded and he was driven to a friends home by Trooper Hard, where he was arrested two hours later by the same troopers who just a short time earlier had told Thompson that he would not be arrested.

The trial court judge in his memorandum opinion characterized the troopers actions as a "devious tactic" and found that the troopers had intentionally circumvented the Miranda requirement to increase their chances of obtaining a confession from Mr. Thompson. The Alaska Court of Appeals characterized the decision of the trial court as "correct" and affirmed Mr. Thompson's conviction. (Published opinion at 768 P. 2d 127, Alaska App. 1989).

The Alaska Supreme Court denied review without opinion.

In the United States District Court, Judge Sedwick found that "State court findings of fact are presumed correct in Habeas Corpus proceedings" and denied the petition.

The Ninth Circuit Court of Appeals declined Mr. Thompson's invitation to find that the analysis of custody, for Miranda purposes, is a mixed question of law and fact. Relying upon Kranz v. Briggs, 983 F. 2d 961, 963-64 (9th Cir. 1993), as well as U.S.C. §2254 (d). Although, it should be noted that Mr. Thompson proceeded pro se in the Ninth Circuit Court of Appeals and in his opening brief he listed the standard of review as that prescribed by 28 U.S.C. §2254 (d), however Mr. Thompson's counsel at oral argument made it clear to the three judge panel that the

proper standard was de novo review in regards to a Miranda issue. The Court concluded that whether a Defendant is in custody for purposes of Miranda is a factual determination entitled to the presumption of correctness under 28 U.S.C. §2254 (d).

REASONS FOR GRANTING THE WRIT

This Court has not ruled upon the question presented. The decision of the Ninth Circuit, on the standard of review, conforms to the approaches of the Seventh and Eighth Circuits, but conflicts with the treatment accorded the question by the Second, Third, Sixth, and Eleventh Circuits. The Second and Seventh Circuits have particularly commented upon the "split" in the Circuits and the lack of guidance form this Court.

ARGUMENT

In 1987, the Second Circuit expressed doubt about the standard of review to be employed in considering a trial court's decision that an individual was not, in custody when he was questioned by the police. It capsulized the Supreme Court's treatment of "custody" for the Fourth Amendment purposes, without identifying a rule of law applicable in the Fifth Amendment area.

The Supreme Court has not been precise in stating whether a trial court's conclusion as to the Fourth Amendment custody is a question of fact or a conclusion of law. In Florida v. Royer,

460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2nd 229 (1983), a case involving a search and arrest of a person fitting the "drug courier profile", see Id., at 493 n. 2, 103 S. Ct. at 1322 n. 2, a plurality of the Court appears to reach an independent conclusion that the defendant was seized within the meaning of the Fourth Amendment:

> Asking for and examining Royer's ticket and his drivers's license were no doubt permissable in themselves, but when officers identified themselves as narcotics agents, told Royer he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for purposes of the Fourth Amendment. Id., at 501, 103 S. Ct. at 1326 (plurality opinion of White, J.).

Earlier in his opinion however, Justice White states that the issue is whether the record supports the conclusion reached by the state intermediate appellate court whose judgement was being reviewed. Id. The state appellate court had disagreed with the trial court. A plurality of the Supreme Court was more explicit in United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), the first major drug courier profile case, rebuking the Court of Appeals for substituting it's view of the evidence for that of the District Court. Id., at 557, 100 S. Ct. at 1878 (plurality opinion of Stewart, J.) (citing Jackson v. United States, 353 F. 2d 862 (D.C. Cir. 1965), (applying a "clearly erroneous" test). But cf. Davis v. North Carolina, 384 16 L. Ed 2d 895 (1966), (stating that appellate courts are to make an "independent determination of the ultimate

issue of voluntariness" of a confession).

United States v. Ceballos, 812 F. 2d 42, 47 n. 1 (2d Cir., 1987).

The Seventh Circuit was no better positioned three years latter to ascertain the Supreme Court's direction on the question of custody:

> As an initial matter, there is a question as to the proper standard of appellate review of whether a person was "in custody" for purposes of Miranda. Linnick, claims that the proper standard is de novo review of the district court's holding. For support, he points to United States v. Hocking, 860 F. 2d 769, 772 (7th Cir. 1988), where the court held that the "ultimate issue of whether there was a custodial interrogation is a mixed question of law and fact". As such, Hocking held that the district court's "determination is independently reviewable by an appellate court". Id. There was no direct authority for this holding, however, and the court in Hocking noted conflicting authority supporting the more deferential "clearly erroneous" standard. See Id.

Due to lack of definitive Supreme Court precedent on the issue, see United States v. Boden, 854 F. 2d 983, 990 (7th Cir., 1988), the announced standards range from Hocking's de novo review, 860 F. 2d at 772, to an intermediate standard of granting the district court's determination "some difference", United States v. Ceballos, 812 F. 2d 42, 47 & n.1 (2d Cir. 1987), to the clearly erroneous standard that grants district court determinations the greatest deference. United States v. Teslim, 869 F. 2d 316, 321 (7th Cir. 1989); cf. United States v. Malin, 980 F. 2d 168, 169-70 (7th Cir. 1990) (noting a split in authority on the question whether probable cause determinations

are entitled to de novo or clearly erroneous review). The government does not address the question and fails to suggest an appropriate appellate standard in this case.

United States v. Lennick, 917 F. 2d 974, 976-77 (7th Cir. 1990). The Seventh Circuit did not resolve the question in Lennick. It's 1988 decision in Hocking, citing in Lennick, includes an express election of the view that "custody" is a mixed question of law and fact, requiring "independent review" in the appellate court. United States v Hocking, 860 F. 2d 772. In a recent turnabout, the "precedential value" of Hocking was "vitiated" in favor of deference to the findings of the District Court, because, a 1992 panel found, Hocking had been decided in a manner out of line with the thinking of the other circuits. United States v. Levy, 955 F. 2d 1098, 1103 & n. 5 (7th Cir. 1992). Levy, however, may not represent a final solution even in the Seventh Circuit; the court expressly endorsed deference only to the "underlying factual findings and ... resolution of credibility disputes" of the district court. It did not decide whether the conclusion of legal significance, whether those facts supported a finding of custody, was one to be decided under the "clearly erroneous" standard as well.

The Eighth Circuit has made a more clearly identifiable choice: the finding that an individual questioned by the police is in "custody" is reviewed under a "clearly erroneous standard". United States v. Sutera, 933 F. 2d 641, 646 (8th Cir. 1991); United States v. Griffin, 922 F. 2d 1343, 1347 (8th Cir. 1990).

In contrast, the Second Circuit accords "some deference" to

the conclusions of the trial court because the findings in a particular case may be intertwined with creditability determinations, but the resolution of whether a reasonable person would have believed himself to have been in custody is regarded as a legal question independently evaluated on the appeal. United States v. Ceballos, 812 F. 2d at 46-47.

The Third, Sixth, and Eleventh Circuits fall in line with the Second. Without qualification, these three courts consider the question of law and fact warranting de novo review. See for example, Jacobs v. Singletray, 952 F. 2d 1282, 1291 (11th Cir. 1992); Williams v. Withrow, 944 F. 2d 284, 288 (6th Cir. 1991); United States v. Torkington, 874 F. 2d 1441, 1445 (11th Cir. 1989); United States v. Calisto, 838 F. 2d 711, 717 (3rd Cir. 1988); Cobb v. Perini, 832 F. 2d 342, 346 (6th Cir. 1987); United States v. Mesa, 638 F. 2d 582, 591 (3rd Cir. 1980).

The argument favoring an independent review is expressed in the concurrence in United States v. Mesa:

> "Custodial interrogation" is a legal term of art central to Miranda jurisprudence, and a decision whether or not "custodial interrogation" occurred is a matter of law to be determined in accordance with the policies underlying the Miranda rule. The legal nature of the determination is evidenced by the numerous Supreme Court decisions deciding whether certain facts constitute "custody" or "interrogation". See, e.g. Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980); Oregon v. Mathiason, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977); Orozco v. Texas, 394 U.S. 324, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969).
>
> Accordingly, an appellate court is free to re-examine the trial court's legal conclusion as to the applicability of the Miranda rule.

> The standard of appellate review does not change simply because the legal determination in a Miranda situation depends on the particular facts of each case. United States v. Mesa, 638 F. 2d at 591 n. 3.

Perhaps this courts holding in Miller v. Fenton, 474 U.S. 104, 88 L. Ed. 2d 405, 106 S. Ct. 445, will assist the Court, as it resolved the issue of whether voluntariness of a confession was a issue of fact or a legal question meriting de novo review in the appellate court's.

State court judge's are not in an appreciably better position than the federal habeas corpus court to make determinations in confession cases because "the taking of a confession almost invariably occur, not in open court, but in a secret and more coercive environment". "The practical considerations that have led this Court to find other issues within the scope of the §2254 (d) presumption are absent in the confession text". Id., at 407.

Unlike such issues as the impartiality of a juror or competency to stand trial, assessments of creditability and demeanor are not crucial to the proper resolution of the ultimate issue of facts in a confession secured in violation of Miranda; the trial court in Mr. Thompson's case relied on the two hour confession transcript to reach it's determination, so why would a federal habeas court be in a subordinate position to assess the same record? This issue is no different than a voluntariness issue where this Court found was beyond the reach of §2254 (d); Miller v. Fenton, Id. at 414, (1985).

CONCLUSION

The circuits are irretrievably split on a question of grave concern to those charged with criminal offenses in the state and federal courts: Shall federal courts independently review, based upon uniform federal standards, the occasions which require the administration of Miranda warnings? The Circuit Courts are now moved to acknowledge the divergence in the decisions of the courts on this question and to bemoan a lack of direction from this Court. The issue invites the intervention of the Supreme Court on certiorari.

Respectfully Submitted,

CARL THOMPSON

Dated: October 6, 1994

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

CARL THOMPSON, Petitioner, v. JOSEPH CLASS, et al., Defendants.	CASE NO. A91-171 CIVIL INITIAL REPORT AND RECOMMENDATION RE: PETITION FOR HABEAS CORPUS

Carl Thompson, presently serving a life sentence for first degree murder following a conviction in an Alaska state court, has filed a habeas corpus petition under 28 U.S.C. §2254 in which he claims his Constitutional rights to due process and against self-incrimination were violated when his involuntary confession was admitted at trial during the prosecution's case-in-chief. This Court, having reviewed the petition, the memorandum in support thereof, and exhibits attached thereto, including a transcript of petitioner's statements to the police, the state's response

thereto and petitioner's reply, and having heard argument thereon, now makes its Report and Recommendation.

FINDINGS OF FACT

1. In 1987, in the Alaska Superior Court in Fairbanks, Alaska, petitioner was convicted by a jury on one count of first-degree murder and one count of tampering with physical evidence. He was subsequently sentenced to ninety-nine years on the first-degree murder conviction and an additional five years on the tampering charge to be served consecutively. The Alaska Court of Appeals affirmed the convictions, found the consecutive five year sentence for tampering to be excessive and remanded for resentencing. On remand, the trial court resentenced petitioner to a term of 99 years.

2. Petitioner moved to suppress the tape recorded confession he made to two Alaska State Troopers before trial on the grounds that the interrogation violated his fifth amendment Miranda rights; and that his resulting confession was involuntary. The motion was denied. At trial, during the prosecution's case-in-chief, a portion of the tape

recorded confession in which he admitted stabbing his ex-wife was played to the jury.

3. Petitioner has exhausted his available state court remedies.

4. On September 10, 1986, the body of a woman was found floating in a lake off the Elliott Highway by two moose hunters. The woman had been severely beaten and stabbed a total of twenty-nine times. She was clad only in a T shirt and wrapped in chains, a bedspread and a tent fly. There was a heart-shaped tatoo with the name "Carl" over her left chest. After the Alaska State Troopers advertised for information concerning the identity of the body, Carl Thompson telephoned the troopers and reported that the description fit his former wife who had been missing since that August. A subsequent dental examination conclusively identified the body as Thompson's former wife, Dixie.

5. On September 15, 1986, after questioning Thompson's brother-in-law and another witness, the Alaska State Troopers' investigation focused on Thompson as the most likely person to have killed Dixie Thompson.

6. Intending to question Thompson about the murder, Trooper Stockard contacted him and asked him to come in to

the trooper headquarters on the pretext of identifying a coat, some jewelry boxes and jewelry that might have belonged to his former wife. Once Thompson arrived at the office, Stockard and another trooper interrogated Thompson for approximately one hour and 16 minutes. During the questioning, Stockard repeatedly informed Thompson that he was not under arrest, that he was free to leave at any time, and that he would he would be able to leave when the questioning ended.

7. During the interrogation, the troopers told Thompson that they believed he had killed his former wife and urged him to help them get at the truth. Stockard told Thompson to tell his side of the story so that they could present that version to the District Attorney. Otherwise, he warned Thompson that the prosecutor might conclude that killing of Dixie Thompson was first-degree murder. Stockard suggested that if Thompson explained his part in the slaying, it was possible that he might only be guilty of a lesser charge such as manslaughter or negligent homicide; and would be facing a minimal sentence such as two to five years, as opposed to a ninety-nine year sentence for first-degree murder.

8. After several lengthy statements by the troopers in which they informed Thompson that they didn't think the killing was first-degree murder, and guaranteed him that they weren't going to arrest him in the office and that he would be permitted to leave, Thompson abandoned his original story and admitted killing his ex-wife. In so doing, he asserted that he initially stabbed her in self defense and then lost control and continued to stab her in the heat of passion.

9. Once the interrogation was concluded, Thompson was permitted to leave the trooper headquarters, as promised. He was arrested approximately two hours later and charged with first degree murder.

10. At no time during the interrogation did the troopers advise Johnson of his Miranda rights.

DISCUSSION

This petition raises two questions. First, was Thompson's confession obtained in violation of his 5th Amendment right against self-incrimination? Second, were his statements involuntary? For the reasons given herein,

the answer to both questions should be in the negative.

Thompson was neither in custody nor deprived of his rights in any significant way during the interrogation. He was repeatedly told that he was not under arrest and that he could leave anytime. Trooper Stockard even guaranteed that he would be free to leave at the end of the questioning. In fact, when the questioning was finished and he had admitted killing his wife, he was allowed to go.

The trial judge found that Thompson was not in custody for Miranda purposes. The Alaska Court of Appeals affirmed his decision. (Thompson v. State, 768 P.2d at 130-31). This finding is presumptively correct. See 28 U.S.C. § 2254(d)

The United States Supreme Court has held that a person who is a suspect is not in custody for Miranda purposes unless there has been some actual indication of custody that would make a reasonable, innocent person feel that he was not free to break off the questioning and leave. See Minnesota v. Murphy, 465 U.S. 420, 431, 104 S.C. 1136, 1144, 79 L.Ed.2d 409 (1984); California v. Beheler, 463 U.1S. 1121, 1124, 103 S.Ct. 3517, 3519-20, 77 L.1Ed.2d 1275 (1983). The Supreme Court has adopted an objective,

"reasonable man" test for deciding whether a person is in custody or otherwise subject to restraints comparable to those associated with formal arrest. See Berkemer v. McCarty, 468 U.S. 420, 441, 442, 104 S.Ct. 3138, 3150, 3151, 82 L.Ed.2d 317 (1984).

In determining whether someone is in custody, the trial court must consider the totality of the circumstances and then decide whether a reasonable person would have believed that he or she was not free to leave. United States v. Pinion, 800 F.2d 976, 978-79 (9th Cir. 1986), cert. denied, 480 U.S. 936, 107 S.t. 1580, 94 L.Ed.2d 770 (1987). Relevant factors to be considered are: (1) the language used by the officer to summon the individual; (2) the extent to which the individual is confronted with evidence of his guilt; (3) the physical surroundings of the interview; (4) its duration; and, (5) the degree of pressure applied to detain the individual. United States v. Wauneka, 770 F.2d 1434, 1438 (9th Cir. 1985).

Here, there is no indication language was used by trooper Stockard that would imply to Thompson that he should expect to be arrested when he came into the office. During the interrogation, he was confronted with some evidence

implying his involvement in his ex-wife's killing (e.g. tire tracks at the scene where the body was found similar if not identical to the tire patterns on his vehicle), although this information did not appear to be sufficient by itself to encourage him to change his story.

The interview took place On September 15, 1986 in the troopers' offices. It began at 10:58 a.m. and ended at 12:14 p.m.. Thompson was not physically restrained in any way. Both troopers were dressed in plain clothes. There is no indication that he would have been prevented from leaving if he chose to do so. His vehicle keys were not taken from him until after he confessed, and he was told that his truck was going to be impounded. He was repeatedly told that he was free to leave. He was permitted to leave following the interrogation. The location, by itself, does not indicate Thompson was in custody and required Miranda warnings. Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977). Neither does the hour and sixteen minutes involved in the questioning.

Thompson spoke freely with the troopers concerning his relationship with his former wife. He initially offered them a scenario in which he appeared to be innocent of his

ex-wife's death. The troopers had focused on him as the principal suspect in her killing, although this, by itself, is insufficient to require Miranda warnings. Minnesota v. Murphy, 465 U.S. 420, 431, 104 S.Ct. 1136, 1144, 79 L.Ed.2d 409 (1984). They obviously wanted him to implicate himself; and, employed classic interrogation techniques in their successful attempt to secure a confession. Nevertheless, they consistently reminded Thompson that he was free to leave at any time he wanted.

Both the trial judge and the state appellate court carefully considered the totality of circumstances surrounding this issue. They applied an objective, reasonable person test, finding that Thompson was not in custody at the time of his interrogation and, therefore, the troopers were not required to give him his Miranda warnings. The record amply supports this finding.

Thompson alleges that his confession was coerced by the troopers' promise to bring his version of the facts to the attention of the district attorney, and their statements implying to him that they believed he might be charged with negligent homicide or manslaughter, rather than first degree murder, if they did. This argument fails because the troopers never directly or indirectly promised that they would do more than bring his story to the prosecutor and

search for any facts that would corroborate it. They did not have the charging authority, and they never implied otherwise. Their statements, by themselves, are not sufficient to render Thompson's statements involuntary: "The promise must be sufficiently compelling to overbear the suspect's will in light of all attendant circumstances." United States v. Leon Guerrero, 847 F.2d 1363 at 1366 (9th Cir. 1988). The Alaska Court of Appeals, after a careful review of all of the circumstances surrounding the confession, found that the troopers' statements were not the kind of inducements that were likely to overcome his will and bring about a confession that was not voluntary. Thompson v. State, 768 P.2d at 131-32. The record supports this finding.

RECOMMENDATION

Based upon the foregoing, it is hereby recommended that this petition be DENIED.

DATED this 29th of December, 1992.

Harry Branson
U.S. Magistrate Judge

CC:
JUDGE SEDWICK
J. A. Scukanec (AAG-318)
M. Friedman

Andres v. McCall 628 F.2d 1185

Pursuant to Local Magistrate Rule 12(C), a party seeking to object to this proposed finding or recommendation shall file written objections with the Clerk of U.S. District Court no later than THURSDAY, JANUARY 21, 1993. The failure to object to a magistrate judge's findings of fact may be treated as a procedural default and waive the right to contest those findings on appeal. McCall v. Andres, 628 F.2d 1185, 1187-89 (9th Cir.) cert denied 450 U.S. 996 (1981). Response(s) to the objections shall be filed on or before WEDNESDAY, FEBRUARY 3, 1993. No reply to a response will be received. The parties shall otherwise comply with provisions of Local Magistrate Rule 12(C).

Reports and recommendations are not appealable orders. Any notice of appeal pursuant to Fed.R.App.P. 4(a)(1) should not be filed until entry of the district court's judgment. See Hilliard v. Kencheloe, 796 F.2d 308 (9th Cir. 1986).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

CARL THOMPSON,

Petitioner,

v.

JOSEPH CLASS, et al.,

Defendants.

Case No. A91-171-CIV (JWS)

ORDER FROM CHAMBERS

BACKGROUND

On December 29, 1992, Magistrate Judge Branson recommended that Carl Thompson's petition for a writ of habeas corpus be denied. Thereafter, following an independent review, this court concluded that the recommendation was correct and denied the petition on February 18, 1993. Petitioner then filed a motion to vacate judgment and to allow a new ten-day period in order to file objections to Magistrate Judge Branson's report and recommendation. This court granted the motion on July 19, 1993. Petitioner then filed timely objections. Following a review of the those objections, Magistrate

Judge Branson certified his initial report and recommendation as final.[1] The matter is now referred back to this court for consideration.

Petitioner Carl Thompson was convicted of first degree murder and tampering with physical evidence. He raises two issues in his petition: that certain incriminating statements were obtained in violation of his Miranda rights; and that the statements were involuntary. Petitioner argues that he was actually in custody when he made the statements. Petitioner has exhausted his state remedies as to these issues.

In his initial and final report and recommendation, Magistrate Judge Branson has made findings of facts, conclusions of law, and recommends that the petition be denied. After a thorough and independent review of the record, with two exceptions to the findings of fact, the court agrees with the Magistrate Judge's recommendation. See United States v. Remsing, 874 F.2d 614, 618 (9th Cir. 1989).

DISCUSSION

I. Was Mr. Thompson In Custody For Miranda Purposes?

Petitioner objects to the Magistrate Judge's finding of fact that Mr. Thompson's questioning lasted approximately one hour and sixteen minutes. The transcript of Mr. Thompson's questioning reveals that it lasted from 10:58 a.m. until 12:54 p.m. See Docket no. 1, Exhibit F. Therefore, as petitioner contends, the questioning lasted for at least one hour and fifty-six minutes.

[1]Magistrate Judge Branson's only revision involved a typing error. In the initial report and recommendation, petitioner Thompson was referred to in one instance as "Johnson."

Petitioner also objects to the Magistrate Judge's implicit finding of fact that Mr. Thompson's keys were only taken from him after he made his confession. In the evidence before the court, it cannot be conclusively determined when, precisely, Mr. Thompson's keys were taken from him. Nevertheless, the evidence shows that Mr. Thompson was repeatedly informed that he was free to leave at any time. See Docket no. 1, Exhibit F, at 27, 49-50, 81, 84-86. Moreover, the Alaska Court of Appeals also found that, at numerous times, Mr. Thompson told he was free to leave. See Docket no. 1, Exhibit A, at 8.

The fact that the questioning lasted almost two hours, rather than one and one-quarter hour, however, is insufficient, on its own, to reverse the state courts' determination that Mr. Thompson was not in custody for Miranda purposes. Federal courts considering habeas corpus petitions give deference to the state court;s factual findings. 28 U.S.C. § 2254(d). The state court's factual determination that Thompson was not in custody is, thus, presumptively correct. See Marshall v. Lonberger, 459 U.S. 422, 431-32 (1983); see also Dres v. Campoy, 784 F.2d 996, 998 (9th cir. 1986) (state court findings of fact are presumed correct in habeas corpus proceedings). Accordingly, this court agrees with the Magistrate Judge's recommendation that Mr. Thompson's petition should be denied.

IT IS THEREFORE ORDERED THAT:

For the reasons stated above, this petition

DATED the 7th day of December, 1993, at

cc: M. Friedman
J. Scukanec (AAG 318)
Magistrate Judge Bra

AO 450 (Rev. 5/85) Judgment in a Civil Case

FILED
DEC 09 1993
UNITED States DISTRICT COURT
DISTRICT OF ALASKA
By Deputy

United States District Court

DISTRICT OF ALASKA

CARL THOMPSON

V.

JOSEPH CLASS, et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER: A91-171CIV (JWS)

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT the petitioner's, Carl Thompson, petition for Writ of Habeas Corpus is DENIED.

APPROVED:

U.S. District Court Judge

8 December '93
Date

12/9/93
Clerk

(By) Deputy Clerk

cc: O&J 5146
AAG 318
M. Friedman

12/10/1993 10:13 FROM K&C CONST. INC. TO P.02

AO 450 (Rev. 5/85) Judgment in a Civil Case

FILED
DEC 09 1993
UNITED States DISTRICT COURT
DISTRICT OF ALASKA
By Deputy

United States District Court

DISTRICT OF ALASKA

CARL THOMPSON

V.

JOSEPH CLASS, et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER: A91-171CIV (JWS)

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT the petitioner's, Carl Thompson, petition for Writ of Habeas Corpus is DENIED.

APPROVED:

U.S. District Court Judge

8 December '93
Date

12/9/93
Clerk

(By) Deputy Clerk

cc: O&J 5146
AAG 318

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARL THOMPSON, Petitioner-Appellant, v. PATRICK KEOHANE, Warden; CHARLES E. COLE, Attorney General, State of Alaska, Respondent-Appellee.	CA. No. 94-35052 DC. No. CV-91-00171-JWS M E M O R A N D U M*

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted August 5, 1994
Anchorage, Alaska

BEFORE: PREGERSON, CANBY and BOOCHEVER, Circuit Judges

Carl Thompson appeals the district court's denial of his petition for writ of habeas corpus. Thompson alleges that his incarceration violates the Constitution because the state trial court admitted statements that Thompson argues were obtained in violation of his Miranda rights and a confession that he argues was involuntary. We affirm.

I.

We recently have held that a state court's determination that a defendant was not in custody for purposes of Miranda is a question of fact entitled to the presumption of correctness under 28 U.S.C. § 2254(d). Krantz v. Briggs, 983 F.2d 961, 963-64 (9th Cir. 1993). Thompson has not shown, and it does not otherwise appear, that any of the exceptions to the presumption, see 28 U.S.C. § 2254(d)(1)-(8) (1988), apply in this case. Accordingly, we may only disturb the state court's factual determination if it lacks even fair support in the record. Krantz at 964.[1]

We have reviewed the entire transcript of Thompson's interrogation. Thompson voluntarily appeared at the trooper headquarters. During the interrogation, the troopers assured him several times that he was free to terminate the interview and leave. Indeed, even after he confessed, Thompson was permitted to leave when the interview was complete. "Fair support" exists for the state court's determination that Thompson was not in custody for Miranda purposes. See id. at 963 (test for determining custody is whether, based upon a review of all the pertinent facts, a reasonable innocent person in such circumstances would conclude that they were not free to leave).

II.

We review de novo the question whether, considering the totality of the circumstances, Thompson's will was overborne through psychological pressure rendering his confession involuntary. See Miller v. Fenton, 474 U.S. 104, 110 (1985). We

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

[1] This standard requires that we "more than simply disagree with the state court." Krantz, 983 F.2d at 964. Accordingly, Thompson's attempts to analogize the circumstances of his interrogation to the circumstances of cases in which this court has held that a federal defendant was in custody for purposes of Miranda are unavailing.

have independently evaluated the transcript of Thompson's interrogation and conclude that, the cumulative effect of those tactics did not overbear Thompson's will.

AFFIRMED.